Drug Plastics & Glass Company, Inc. *and* United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO, CLC, District No. 1. Case 4–CA–19931

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case[1] present the issue of whether the complaint allegations were barred by Section 10(b) of the Act, and whether the Respondent, in the context of a union organizing campaign, solicited employee grievances with the implied promise of correcting them, made threats of plant closure, and threatened an employee with discharge because of his union support.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Drug Plastics & Glass Company, Inc., Boyertown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Donna Nutini and *Linda Carlozzi, Esqs.*, for the General Counsel.

Aaron C. F. Finkbiner III, Esq. (Dechert, Price & Rhoads), of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on March 2 and 3, 1992, at Philadelphia, Pennsylvania, on the General Counsel's complaint which alleged that on April 26, 1991,[1] the Respondent discharged an employee in violation of Section 8(a)(3) of the National Labor Relations Act. The complaint also alleged certain violations of Section 8(a)(1) of the Act.

The Respondent filed an answer admitting the employee was discharged, but denying that it had violated the Act. The Respondent further moved that the 8(a)(1) allegations be dismissed on grounds that they had not been stated in the charge.

The General Counsel and the Respondent were represented by counsel and were given the opportunity to call, examine and cross-examine witnesses, and to file posthearing briefs. On the record as a whole, including my observation of the witnesses and briefs and arguments of counsel, I hereby make the following

FINDINGS OF FACT

I. JURISDICTION

It is alleged and admitted that the Respondent annually ships products valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania, and that it is an employer engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act.

It is further alleged and admitted that United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO, CLC, District No. 1 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

The Respondent is engaged in the manufacture of plastic bottles and other containers to be used in the pharmaceutical industry at several plants, including its principal one in Boyertown, Pennsylvania. At this plant the Respondent has about 120 production and maintenance employees working 3 shifts. The two general categories of employees are machine operator/inspector and process mechanic. Process mechanics principally either work on machines in production or set up machines for production. But as work demands, they can be moved from their primary job to the other.

Allen R. Matthews Jr. worked for the Respondent as a process mechanic for nearly 10 years. His last job was as a setup mechanic on the third shift. (Though unclear from the

[1] On May 20, 1992, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although the judge in sec. IV, pt. A, subsec. a, appears in his concluding statement to have found merit in the complaint allegation that the Respondent in its February 7, 1991 letter to employees created the impression of surveillance, it is clear from the context in which the concluding statement is made, the case cited by the judge, and the absence of such a finding in the judge's recommended Order and notice that the judge left the word ''not'' out of his concluding statement and in fact dismissed this complaint allegation.

We agree that the 8(a)(1) allegations in the complaint which the judge found to be violations of the Act were closely related to the allegation in the charge. We find that those allegations arose out of the Respondent's overall plan to resist the Union, *Well-Bred Loaf*, 303 NLRB 1016 (1991), which continued even after union organizing ceased; that all the allegations occurred after the Respondent's acknowledged awareness of the organizing effort, cf. *Harmony Corp.*, 301 NLRB 578 (1991); that several of the allegations involved statements to employee Matthews, who was the subject of the timely 8(a)(3) allegation, *Van Dyne Crotty Co.*, 297 NLRB 899 (1990); and that the 8(a)(1) allegations generally occurred during the same time period as the 8(a)(3) allegation. *Southwest Distributing*, 301 NLRB 954 (1991). In these circumstances, we further note that these allegations assert substantial union animus and therefore are related to the timely alleged 8(a)(3) discharge of employee Matthews. *Southwest Distributing Co.*, supra.

[1] All dates are in 1991 unless otherwise indicated.

record, this is apparently the night shift, ending somewhere around 7 a.m.) He also worked for a trucking company, where he is still employed.

On April 26, Matthews was discharged. According to Glenn Forte, the Respondent's vice president for manufacturing, Matthews was discharged because he had smoked on the production floor when production was in progress and he had refused to attend a ''pre-control'' meeting on April 22, and had said he would not attend the one for which he had been rescheduled on May 7. Other factors considered by Forte were reports that Matthews had not been responsive to his duties and had excessive absenteeism during the first 3 months of 1991 (exceeding all his absences in the previous year).

The smoking incident occurred on April 19, and was reported by his supervisor, Steve Trembly, who gave Matthews a ''verbal warning'' (which was recorded as a ''Disciplinary Discussion Report'' dated April 19). Forte learned of this on April 26, in connection with reports he had requested on problems he had heard about concerning the third shift.

Matthews denied receiving a formal warning from Trembly. He further testified that he had often smoked in nonsmoking areas, and had seen supervisors do so. Nevertheless, he knew that smoking was not allowed on the production floor during production ''because of contamination.''

Sometime in January, the Union began a modest organizational campaign. There is no evidence that any of the Respondent's employees were active participants or even signed authorization cards. There was no testimony of any union organizer concerning the nature and extent of the campaign—whether there were meetings of employees, how many and when, and whether authorization cards were solicited and signed. From this record, I find at best there was some minimal discussion about the Union among employees.

However, the Respondent did learn that there was some union activity afoot and in response held a series of meetings among employees in early February. There was apparently one large meeting and then several small meetings at which five or six employees would attend with Forte and another representative of management.

There is no evidence that Matthews was actively involved in the organizational campaign. He did not solicit authorization cards, nor is there evidence he even signed one himself. He did not pass out literature or contact other employees. There is no evidence, other than his testimony which I basically discredit, that any representative of management even knew that he favored the Union.

Though Matthews testified that at the time of his discharge, the campaign for the Union ''was going real good,'' this is not corroborated by other witnesses for the General Counsel.

Leo Henry testified that he was somewhat active in speaking for the Union and that he attended two meetings, but he did not remember if they were ''right before or right after'' Matthews was terminated. He further testified that a meeting was scheduled for the Tuesday after Matthews was discharged, but it was canceled. This testimony is generally at odds with the documentary and other evidence concerning when the union activity occurred, which places it in January and February. Nor is it corroborated by testimony of the union organizer (if there was one), or anyone on behalf of the Charging Party who would be in a position to know. Thus I discredit Henry's testimony to the extent it suggests that the organizational campaign was ongoing at the time of Matthews' discharge.

Indeed, the sum of the testimony supports the assertion of Forte that there was no union activity after February.

III. ANALYSIS AND CONCLUDING FINDINGS

A. *The 8(a)(1) Allegations*

The complaint alleges violations of Section 8(a)(1) by soliciting employee grievances, promising to improve conditions of employment, creating the impression of surveillance of employees' union activities, promising increased wages, threatening to close the plant and unspecified reprisals, threatening to discharge an employee for union activity, and instituting a wage increase.

The Respondent generally denied the substance of these allegations, and in addition moved for their dismissal on grounds that they are ''barred by time and the applicable rules, regulations, and statutes of limitation relating to timeliness of claims.'' At the outset of the hearing the Respondent filed a motion in limine to exclude from consideration matters not in the charge, which I took under advisement.

The charge was filed on July 11, 1991, and alleged: ''The above named employer unjustly terminated Allen Rich Matthews because of his Union activities and support of the Union effort in the above named plant. Allen Rich Matthews was discharged on or around April 26, 1991.''

When the charge was filed, the alleged 8(a)(1) activity was not time-barred by Section 10(b); however, by the time the complaint issued, most of it was. Therefore, in order to sustain the General Counsel's position, it would be necessary to conclude that the charge covers that activity.

As often noted, the Act is not self-enforcing. A charge is required to initiate the Board's investigatory power. Though the General Counsel's authority to initiate a complaint based on its investigation is broad, he does not have ''carte blanche'' to allege anything which might turn up during an investigation. Only that activity which arises out of or is related to the charge can be alleged in the complaint. *NLRB v. Fant Milling Co*., 360 U.S. 301 (1959).

In *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board reversed its policy that the 8(a)(1) boilerplate language on the charge form could suffice as an allegation of 8(a)(1) violations not otherwise stated. Alleged violations of the Act are now deemed covered by the charge only if they arise out of or are ''closely related'' to those stated in the charge.

Unquestionably the 8(a)(1) allegations in the instant complaint were not set forth in the charge. The General Counsel argues, however, that they are closely related because they have to do with the Respondent's antiunion campaign, just as did its discharge of Matthews. Further, this activity is proof of union animus, which is relevant to the General Counsel's case, and therefore must be deemed closely related. I agree.

There is an initial issue of whether the Board's jurisdiction should be tested by the General Counsel's allegations, or the proof. Judge (now Justice) Stevens suggested the former in his dissent in *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743 (7th Cir. 1973). And this seems reasonable, for one cannot know in advance of considering an allegation on its merits whether it should be sustained or not.

The Respondent contends that proof is controlling. Since Matthews was discharged for cause, there can be no factual nexus between his discharge and the alleged 8(a)(1) citing *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990), wherein it was held that allegations will not be found ''closely related based on legal theory alone.''

Nippondenso, however, is inapposite. As here, the charge alleged a single 8(a)(3) discharge but the complaint alleged only violations of Section 8(a)(1). There was no reference in the complaint to the discharge. While the General Counsel argued a theoretical connection between the charge allegation and the complaint allegations, there was no factual connection because there was no evidence concerning the discharge.

Here, the 8(a)(1) activity is clearly relevant to a material issue involving the Matthew discharge—union animus. Thus not only does the 8(a)(1) activity arise out of the same alleged antiunion campaign, but those facts must be considered in evaluating whether the discharge was a violation.

Accordingly, I conclude that 8(a)(1) allegations in the complaint are closely related to allegation in the charge and the Board has jurisdiction to consider them. *Harmony Corp.*, 301 NLRB 578 (1991).

Though I conclude that Matthews' discharge had no relation to the union campaign, or any steps the Respondent may have taken to counter it does not mean the allegations are not closely related. It means only that all the facts fail to establish a violation of Section 8(a)(3).

1. February 7 solicitation of grievances and impression of surveillance

On February 7, the Respondent sent each employee a letter in which the General Counsel contends employees' complaints and grievances were unlawfully solicited; and in which the Respondent created the impression that employees' union activity was under surveillance.

In material part the letter read:

> In conversations with many of you over the past several days we've become aware of a number of issues that are of concern to all of us.
>
> We were already working on some of these concerns, particularly in the area of benefits. In fact, we have been actively discussing possible changes to our benefit programs with outside consultants for several months. Certain other issues that have been raised also are not new to us, but frankly we were not aware that these issues were as severe as some have described. In order to make sure that we really understand your concerns, I will be meeting with all of our employees, in small groups, next week.
>
> We understand that the Rubber Workers Union is trying to convince some people to sign cards authorizing the union to represent them. I hope that you don't think that signing a union card will resolve your concerns. We think that a ''third party'' will actually create problems, not solve them.

Although an employer is permitted by Section 8(c) to express its opinion on all manner of issues, including a union organizational campaign, it may not solicit grievances with the implied promise they will be corrected. Solicitation of grievances is the thrust of Forte's letter, and was thereby violative of Section 8(a)(1). *T & H Investments*, 291 NLRB 409 (1988).

However, to state that the Respondent had learned there was some union activity does imply that employees were under surveillance. *Clark Equipment Co.*, 278 NLRB 498 (1986).

2. The February 14 solicitation of grievances and the promise to increase wages

Consistent with his letter, Forte met in small groups with all employees. Leo Henry testified that Forte ''said that he wanted to tell us that Drug Plastics did not need a third-party influence; that any problems would be solved, and he wanted to know what our problems were as employees.''

Former employee Matthew Landis testified, ''They wanted to know what the problem was, why we wanted to have the union in there, what could be done to make things better.''

Forte admitted he held meetings with, ultimately, all the employees. He did not deny the essence of the statements attributed to him by Henry and Landis. I therefore conclude that Forte in fact did meet with employees, during which he solicited grievances from them. Such necessarily implies a promise to remedy the grievances, and coming at the outset of an organizational campaign interferes with employees Section 7 rights.

He did not, however, promise a wage increase in violation of the Act. Employees asked about their wage increase, which the Respondent had given every April for years. Forte stated, as he always did, that they would be pleased. Forte did not initiate the subject of wage increases; and to grant such in April was an established practice. Accordingly, I conclude that Forte did not make and unlawful promise as alleged in paragraph 5(b) of the complaint.

3. The threat by John Rogers

In paragraph 6 of the complaint it is alleged that Assistant Vice President John Rogers threatened employees with unspecified reprisals if they signed union authorization cards.

To this allegation, Henry testified that ''Mr. Rogers said that he wanted to tell us and warn us not to sign union cards if [we] were approached because union cards could be used against us because they were a binding contract.'' And Landis testified: ''They [Ken Pake and John Rogers] talked about the union coming in and recommended us not signing the cards, the union cards because they heard we were being approached to sign the union cards and, if you signed one, you were stuck. It was a commitment. It was like a contract. Basically, it was just union talk.'' Collingwood testified that Rogers said ''that a union card was a legal binding statement. Your signature was legal and binding. And that by you signing that it could be used against you.'' Matthews testified that Rogers ''said if you signed the cards, that could be like a legal and binding contract to be used against you.''

The Respondent called no witnesses to deny or explain the statements attributed to Rogers. I therefore find that he did tell employees in substance that a union authorization card is a legal document. However, this was a true statement, albeit superficial, since the legal effect of an authorization card is complex. In any event, nothing in the statements attributed to Rogers was a threat; thus I conclude Section 8(c) protects

his right to make them. *Daniel Construction Co*., 257 NLRB 1276 (1981).

Accordingly, I will recommend the allegation in paragraph 6 of the complaint be dismissed.

1. Threat of plant closure by Tim Matthews

It is alleged in paragraph 7 of the complaint that in mid- to late February Supervisor Tim Matthews (a cousin of Allen R. Matthews) threatened two employees with plant closure if the Union was selected as the employees bargaining representative.

Matthews testified that in a conversation with Tim Matthews about the Union, Tim said, ''it [whether Matthews favored the Union] didn't really matter. If the union ever got in, Fred Bersecker [sic] would close the plant.'' Fred Beisicker is president and one of the family members who own the Respondent.

Similarly, Landis testified that Tim Matthews ''said Fred would shut the place down before he'd let the union in there.'' And this statement, according to Landis, was made by Tim Matthews several times.

Neither Tim Matthews nor anyone else denied that he made the statements attributed to him. I therefore find these statements were made in substance as testified to by Matthews and Landis, and that a supervisor threatened employees with reprisals if they exercised their Section 7 right to select a bargaining representative.

The Respondent's only defense to this allegation (and that in paragraph 8) is that Beisicker would not likely in fact close the plant. Forte's opinion in this regard has no tendency to disprove that Tim Matthews told employees that Beisicker would close it.

I therefore conclude that an agent of the Respondent made a threat to employees in violation of Section 8(a)(1) of the Act.

2. Threat of plant closure by Fred Beisicker

Undenied is the testimony of Matthews that sometime in March, in the lunchroom with several employees present, Beisicker ''said it was the worst week of his life. We were sitting around and somebody had mentioned about the union, and he himself said he'd close the plant if the union got in.''

Although I found Matthews not to be a reliable witness, and generally do not credit him where there is a conflict in the testimony, the statement attributed to Beisicker is undenied. Since Beisicker could have testified but did not, I must infer he would not have denied Matthews' testimony. I therefore conclude that he made a threat of plant closure in violation of Section 8(a)(1) of the Act.

As above, that it makes little sense he would in fact close the plant is not relevant, particularly where there is undenied testimony of the threat.

6. Activity of Bill Mellen

It is alleged in paragraph 9 of the complaint that on June 20, Supervisor Bill Mellen created the impression that employees' union activity was under surveillance and threatened an employee with discharge.

The evidence supporting this allegation is in the testimony of Leo Henry. Mellen did not testify.

Henry testified that after Matthews was discharged the organizing drive ''was totally eliminated.'' Yet he further testified that some 2 months later, his Supervisor Mellen

> said he would suggest to me that I would do a little less talking and a little more working because he said I had been labeled as one of the union organizers at Drug Plastics; that he had noticed it and also some of the managers.
>
> And I asked him right then, I said, what does this ultimately mean? Does this ultimately mean I'm going to be fired? He said, yes, it could come to that.

While this testimony appears inconsistent with Henry's statement that there was no more union activity after Matthews' discharge, it stands undenied. Therefore I must conclude that Mellen made the statements attributed to him.

For the reasons set forth above, I do not believe that the statement of Mellen created the impression that employees' union activity was under surveillance. However, the threat of a possible discharge of an employee who is stated to be a known union supporter is a threat in violation of Section 8(a)(1).

Since this occurred 2 months after Matthews' discharge, the Respondent argues it could not possibly be closely related to the charge allegation, and therefore should be dismissed. I conclude, however, this violation does have some relevance to the Matthews discharge in that it tends to suggest that the Respondent was disposed to discharge union adherents. Although I conclude that Matthews was lawfully discharged, such does not alter therelevance of the statements by Mellen, and therefore I find they are closely related to the charge.

7. The April wage increase

For years the Respondent has given a general wage increase in April. The General Counsel nevertheless alleges that the one given in 1991 is violative of the Act because in 1990 a 4.9-percent increase was given, whereas the 1991 increase was 6.4 percent. Forte testified, however, that increase was really 5 percent, since it was anticipated that a revamping of the health insurance in the summer of 1991 would require employees to contribute 15 cents per hour.

I found Forte's testimony concerning the wage increase credible and reasonable. I find that the Respondent granted a wage increase on generally the same factors (similar industries in the area and company profits) as it had in the past and the increase, even if it was 6.4 percent, was consistent with its past practice. Accordingly, I conclude the Respondent did not violate the Act by granting its customary wage increase. *Alco Venetian Blind Co.*, 253 NRLB 1216 (1981).

B. *The Discharge of Matthews*

Matthews is alleged to have been discharged because he ''supported and assisted the Union.'' On this the evidence is paltry to nonexistent. The total of evidence that Matthews even supported the Union was his testimony that he talked to other employees about the Union in the lunchroom; in late February he talked to his cousin, Supervisor Tim Matthews, who said ''he heard I was interested in the Union;'' and in

''small talk'' with day-shift Supervisor Al Gambler in mid-April Matthews said he was in favor of the Union.

Even though Tim Matthews and Gambler did not testify, I have difficulty believing these conversations took place. I found Matthews not to be a credible witness. For instance, he denied receiving any ''written warning'' and when two ''Disciplinary Discussion Reports'' (dated February 25 and March 20) were produced, he stated that they were not ''written warnings.'' They were ''verbal warnings.'' This semantic distinction may be literally true, but his testimony was certainly not forthcoming. I conclude that Matthews initial testimony was an attempt to mislead me in an area he considered material.

But even if Matthews did talk to his cousin and Gambler about the Union and even if he did state his preference for it, such hardly rises to the level of assistance or support which would motivate the Respondent to single him out for discharge. There is just no evidence that Matthews was active in whatever organizing effort there may have been.

Further, there is no basis to infer or impute knowledge of union activity by Matthews to the Respondent. The General Counsel argues that a supervisor's knowledge of one's union activity is imputed by law to the Respondent, citing *Pellegrini Bros. Wines*, 239 NLRB 1220 (1979). But this is available only when it is shown that the employee in fact engaged in union activity and a supervisor knew of it. Here, even accepting the testimony of Matthews, all two supervisors knew was that he was favorably disposed to the Union. If in fact Matthews had been active on behalf of the Union, then imputing this to management would be warranted. Since he was not, no such conclusion can be reached.

I credit Forte's testimony that he did not know whether or not Matthews supported the Union; and, it was Forte who made the decision to discharge Matthews.

In essence, the General Counsel argues that the Respondent condoned smoking in nonsmoking areas of the plant, from which it can be inferred that this reason for discharging Matthews was a pretext, which in turn leads to the inference that the real reason was something else. The something else can be inferred to have been the Union's attempt to organize employees, given Matthews activity on behalf of the Union, the Respondent's animus toward the Union, and the timing of the discharge with the organizational campaign.

On this record I conclude that the inferences sought by the General Counsel are not valid. While there may have been smoking in some nonsmoking areas, there is no evidence that Forte, or other members of management, were aware of smoking on the production floor while production was in progress. And I find there was none—or at least none known to management. There is simply no evidence that any other employee had been found smoking on the production floor during production had not been discharged. I conclude that smoking on the production floor while production was in progress (if in fact there were other instances of it) was not condoned.

The General Counsel contends that ''smoking in other than designated areas'' is a violation of group I work rules which provide for progressive discipline. To discharge Matthews was excessive under the rules and was therefore a pretext. I disagree. Most of the plant is designated nonsmoking. Matthews' offense went beyond simply violating the rule. Smoking near production is much more serious. The fact that what Matthews did is not specifically covered in the work rules does not make his discharge a pretext. Indeed, failure to wear a hair net is also not covered in the work rules, yet there is no doubt wearing one is required.

Smoking in other nonsmoking areas, while a breach of company policy, differs in seriousness from smoking around production. Because of the end use of the products manufactured, extraordinary steps are taken by the Respondent to ensure they are free from contamination. For instance, employees working around production are required to wear hair nets.

The seriousness of the Respondent's policy against smoking around production is further corroborated by an event which happened a few weeks prior to Matthews' discharge. A customer complained about ashes in a bottle it received. The Respondent's director of quality control concluded the bottle had become contaminated after it had been shipped, and wrote that the Respondent's practices do ''not allow smoking on the production floor. Smoking on the production floor is grounds for dismissal.''

Finally, while admitting the incident of smoking for which he was discharged, Matthews testified that he had not been smoking near production and that he would not do so ''because of contamination.'' Matthews understood that the possibility of contamination was the reason for the rule against smoking near production.

Thus the fact issue whether Matthews smoked near production, or whether Forte reasonably believed he did. I find both to have been the case. Matthews' denial is not convincing. I believe, and find, that Matthews in fact smoked a cigarette near a machine which was running production and this was stated in a ''Disciplinary Discussion Report'' and subsequently reported to Forte. And I find credible Forte's testimony that he was ''furious'' when so informed.

Matthews was a 10-year employee with a good record. However, his recent record was not so favorable as to suggest that absent the union activity the Respondent would not have discharged him. He was told he had been scheduled for a ''pre-control'' meeting after his shift on April 22. He refused to attend and indeed left his shift early, for reasons he could not explain. When told he had been rescheduled for May 7, he told his supervisor he could not make it (because he had to be with his son). Matthews testified that his supervisor said he would ''take care of it.'' However, these ''pre-control'' meetings were considered important and another employee who had missed his assigned meeting was told he would attend the meeting for which he had been rescheduled or be discharged.

Further, since moving to the third shift in January 1991, Matthews' attendance had been poor. He had been absent more in the 4 four months of 1991 than the entire previous year. While these factors were not the reason for his discharge, they form a credible basis for the Respondent not considering Matthews favorably.

Additional evidence that the discharge of Matthews was not a pretext is the Respondent's well documented policy of giving discipline when the situation requires. The General Counsel put into evidence 171 ''Disciplinary Discussion Reports'' and other written evidence of discipline covering the period from early 1991 through February 1992.

The Respondent discharged three other employees within the same general timeframe as Matthews. Steve Boyer was

reported to have been abusive to a female employee and his immediate supervisor. Forte directed he be discharged. Marge Reitnauer was reported to have been observed sleeping on the job. Forte directed she be discharged. And Forte directed Doug Levengood be discharged because ''he had failed his test, refused to retake it, was not attending class. That he was absent from the floor, that his job performance was in question and upon being questioned when he was absent from the floor he said to his supervisor, fire me, why don't you fire me.''

Forte learned about Levengood at the same time he learned about Matthews, both as a result of Forte's instructing his subordinates to report to him concerning problems he had heard about involving the third shift. Prior to his discharge, Levengood had told Forte he was opposed to the Union.

Since it is the General Counsel's theory that the Respondent sought to rid itself of those favorable to the Union, it would follow that the Respondent would keep those opposed to the Union. Forte's knowledge of Levengood's antiunion sentiments is some evidence negating this theory.

Thus I conclude that the reason for discharging Matthews as testified to by Forte was not a pretext. Further, given the dearth of evidence that Matthews was active on behalf of the Union, or even that the Union mounted much of an organizational drive, and the strong evidence of cause for his discharge, I conclude that the General Counsel did not prove the alleged violation of Section 8(a)(3) by a preponderance of the credible evidence.

C. *The Johnnie's Poultry Allegation*

Michael Collingwood was called as a witness by the General Counsel, was examined, cross-examined, and excused. Thereafter, counsel for the General Counsel moved to amend the complaint to allege unlawful interrogation of Collingwood by counsel for the Respondent during the course of counsel's pretrial preparation.

Counsel for the General Counsel admitted that she knew she would offer the amendment before Collingwood took the witness stand. She offered no jusification why counsel for the Respondent was not notified of the proposed amendment as soon as reasonably possible. Thus I denied the motion to amend on grounds that offering the amendment after the witness had testified and had been excused and just before the General Counsel rested was fundamentally unfair. I did not consider there was a due process problem, because had I granted the amendment I would have recessed the hearing to allow the Respondent adequate time to prepare. My concern was to protect the integrity and fairness of the process.

A special appeal was taken to the Board, and my ruling was reversed.[2] Accordingly, the allegation of unlawful interrogation is now before me. In a telephone conference, confirmed by letter, counsel for the Respondent declined my offer to reopen the record to take further evidence on this issue, and asserted that if the record were to be reopened, he would call no witnesses.

Collingwood testified that ''I explained to Ron Halk [a supervisor] that I was subpoenaed and I would voluntarily answer his [Counsel] questions.'' He met with counsel on February 20, and again on February 27, with another of the Respondent's attorneys.

He testified, when asked ''what if any assurances were given to you during this interview,'' ''None.'' This testimony was the same for both the February 20 and 27 meetings. Thus the interviews took place without the Respondent's counsel having given Collingwood the assurances required by *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). Failure to follow *Johnnie's Poultry* makes interrogation about protected activity by an employer's counsel per se violative of Section 8(a)(1). *Standard-Coosa-Thatcher, Inc.*, 257 NLRB 304 (1981), enfd. 691 F.2d 1133 (4th Cir. 1982). This does not mean, however, that the Respondent violated Section 8(a)(1) of the Act simply by failing to give assurances.

There is no evidence that Collingwood was questioned about anything involving his Section 7 rights or was even questioned. *Johnnie's Poultry* defines the rules for an exception to the general proscription against interrogation of employees concerning matters involving protected, concerted activity. *Johnnie's Poultry* does not stand for the proposition that an interview, even by an attorney, is a per se violation of the Act. *Safelite Glass*, 283 NLRB 929 (1987). Indeed, interrogation is not per se violative of the Act. *Rossmore House*, 269 NLRB 1176 (1984).

To make out a violation of Section 8(a)(1) by coercive interrogation the General Counsel must prove, at a minimum, that there were questions asked of an employee. And these questions must relate to the employee's Section 7 rights. Further, these critical elements of proof cannot be assumed. Maybe Collingwood was interrogated by the Respondent's counsel but maybe he was not. If he was interrogated, maybe in another context it would be found unlawful but maybe not. It is unknown what, if anything, was asked of Collingwood. The entirety of his testimony on this issue, was:

> Q. What if any statements were made to you concerning the purpose of the meeting (February 20)?
>
> A. Yes.
>
> Q. What was that?
>
> A. He was interested to see why I had been subpoenaed.
>
> . . . .
>
> Q. During the meeting (February 27) with Mr. Finkbiner's assistant, what if any statements were made to you concerning the purpose of the meeting?
>
> A. Yes.
>
> Q. What was that?
>
> A. The purpose of the meeting was to explain court procedure and to better prepare their defense.

On this record I conclude that the General Counsel failed to establish that Collingwood was interrogated by counsel in such a manner as would be violative of Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[2] Order dated April 15, 1992.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

Continued

ORDER

The Respondent, Drug Plastics & Glass Company Inc., Boyertown, Pennsylvania, its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Soliciting complaints and grievances from its employees.

(b) Threatening employees with plant closure should they select the Union as their collective-bargaining representative.

(c) Threatening employees with discharge if they engage in union or other protected activity.

(d) In any like or related manner, interfering with, restraining, or coercing our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Boyertown, Pennsylvania, copies of the attached notice, which marked ''Appendix''[4] Copies of the Notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit complaints and grievances from our employees in order to discourage their activity on behalf of any labor organization.

WE WILL NOT threaten our employees with plant closure should they select any labor organization as their collective-bargaining representative.

WE WILL NOT threaten our employees with discharge should they engage in union or other protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

DRUG PLASTICS & GLASS COMPANY, INC.